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BELLSOUTH

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August 2, 2005

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law
Docket No.: 2004-316-C

Dear Mr. Terreni:

Enclosed for filing are an original and ten copies of the Response of BellSouth Telecommunications, Inc. to Cross-Motion for Summary Judgment or Declaratory Ruling in the above-referenced matter. By copy of this letter, I am serving the same on all parties of record.

Sincerely,

Patrick W. Turner

Patrick W. Turner w/ permission nml

PWT/nml
Enclosures
cc: All Parties of Record
DM5 # 595497

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In Re:	)	
	)	Docket No. 2004-316-C
Petition to Establish Generic Docket to	)	
Consider Amendments to Interconnection	)	
Agreements Resulting From Changes of Law	)	
	)	

RESPONSE OF BELLSOUTH TELECOMMUNICATIONS, INC.
TO CROSS-MOTION FOR SUMMARY JUDGMENT OR DECLARATORY RULING

On July 18, 2005, CompSouth filed its *Response To BellSouth's Motion For Summary Judgment Or Declaratory Ruling and CompSouth's Cross-Motion For Summary Judgment Or Declaratory Ruling* ("CompSouth's Cross-Motion") with the Public Service Commission of South Carolina ("Commission"). To the extent that this pleading is a Cross-Motion, BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this response.

INTRODUCTION

BellSouth makes three general responses to CompSouth's Cross-Motion on behalf of its member competitive local exchange carriers ("CLECs") and then discusses in more detail two issues, Issue 8 (relating to Section 271), and Issue 17 (Line Sharing).

First, BellSouth's Motion of Summary Judgment ("Motion") is not premature as CompSouth alleges. The issues raised in BellSouth's Motion can, and should, be decided *as a matter of law*. Deciding the issues raised by BellSouth in advance of the hearing would streamline the hearing process and allow the Commission to focus limited hearing time on true

factual issues rather than on sorting through witnesses' understanding of the controlling law.[1] BellSouth's Motion was designed to allow efficient resolution of the issues before the Commission – nothing more and nothing less.

Second, the Commission can and should summarily deny CompSouth's Cross-Motion because CompSouth maintains that the Commission should not resolve any issues until after the hearing. Those two positions – filing a cross-motion while at the same time claiming no issues should be resolved now – are prohibitively inconsistent. Moreover, it appears that while CompSouth makes a general reference to a cross motion for summary judgment, they only actually moved for two issues to be decided in summary fashion (line sharing and call-related databases). BellSouth agrees that both of these issues should be resolved as a matter of law and requests that the Commission decide them in favor of BellSouth in advance of the hearing.

Third, the vast majority of the issues raised in CompSouth's Cross-Motion were fully addressed in BellSouth's opening brief. Consequently, BellSouth has chosen not to repeat those dispositive arguments here and instead stands on its opening brief. The two exceptions to that approach are Issue 8 (271) and Issue 17 (line sharing). Given both the philosophical and legal importance of these two issues, BellSouth addresses CompSouth's arguments on these points below.

[1] Ordinarily, testimony on the law is subject to objection. Shields v. S.C. Dept. of Highways, 303 S.C. 439, 447, 401 S.E.2d 185 (1991).

DISCUSSION

A. ISSUE 8: (a) Does the Commission have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251? (b) If the answer to part (a) is affirmative in any respect, does the Commission have the authority to establish rates for such elements? (c) If the answer to part (a) or (b) is affirmative in any respect, (i) what language, if any, should be included in the ICA with regard to the rates for such elements, and (ii) what language, if any, should be included in the ICA with regard to the terms and conditions for such elements?

BellSouth's initial brief and CompSouth's Cross-Motion have crystallized the issue regarding Section 271 of the Act as follows: Can the Commission require BellSouth to include Section 271 elements in a Section 252 interconnection agreement?[2] The law provides a clear answer to that question, and that answer is "no."

To fully analyze this issue, the Commission must not look only at Section 271, as CompSouth advocates, but it also must look at Section 252 and the interplay between Sections 271 and 252. This examination leads to the inescapable conclusion that, while Congress gave authority to the state commissions under Section 252, authority over Section 271 elements remains with the FCC.

The crux of CompSouth's argument is that because Section 271 references Section 252, the 271 checklist items are thus to be included in Section 252 agreements. *See, e.g., CompSouth's Cross-Motion,* at 9 ("The language of Section 271 expressly states that BOCs must have checklist items reflected in agreements approved under Section 252"). CompSouth then argues that the necessary corollary is that state commissions have the authority to arbitrate and

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[2] CompSouth claims that BellSouth is seeking relief from all of its Section 271 obligations. *See CompSouth's Cross-Motion,* at 19. That is not the case. BellSouth recognizes that without forbearance from the FCC, BellSouth has an independent obligation to provide the elements in Section 271(c)(2)(B). The issue is how those elements are provided and which regulatory body has authority over them.

set the rates, terms, and conditions of Section 271 elements. *See CompSouth's Cross-Motion,* at 12 (the Section 252 process "is the procedural vehicle that must be used to establish the contract terms, conditions and prices for the Section 271 checklist").

The fallacy in this argument is that it ignores the express language of Section 252. *See CompSouth's Cross-Motion,* at 9 ("The source of the Commission's authority to act under Section 252 to approve terms and conditions for checklist items comes *directly from the text of Section 271.*") (Emphasis added). While Section 271 may refer to Section 252, it does not alter Section 252, and Section 252 specifically *limits* the rate-setting and arbitration powers of state commissions to *Section 251* elements. The express limitations on state commission authority in Section 252 defeats any argument that a state Commission can require BellSouth to include Section 271 elements in a Section 252 agreement.

Put differently, CompSouth's argument fails because it blurs the statutory distinction between rate setting and arbitration for Section 251 elements on the one hand, and rate setting and enforcement for Section 271 elements on the other. According to CompSouth, the Section 252 negotiation, arbitration, and approval process applies equally to both. *See CompSouth's Cross-Motion,* at 9 ("The Commission is not being asked and does not have to assert authority under Section 271 in order to fulfill its mandate to arbitrate and resolve disputed issues in Section 252 ICAs"). That, however, is not the plan that Congress created. Congress allowed states to "set" rates only "for purposes of subsection (c)(3) of such Section [251]" and to arbitrate agreements to "ensure that such resolution and conditions meet the requirements of Section 251 ...." These fundamental federal law limitations cannot be disregarded simply because CompSouth's member CLECs do not like them – they are controlling and must be followed.

1. **Section 252 limits state commission rate-setting authority to Section 251 elements.**

State commissions do not have the authority to set rates for Section 271 elements. This is clear because the language in Section 252 limits state commission rate-setting authority to Section 251 elements. Section 252(d)(1) provides that state commissions may set rates for network elements *only* "for purposes of subsection (c)(3) of such Section [251]." The FCC has stated that this Section "is quite specific in that it only applies for the purposes of implementation of Section 251(c)(3)" and "does not, by its terms" grant the states any authority as to "network elements that are required under Section 271."[3] This express limitation in Section 252(d)(1) on state commission pricing authority in arbitrations is directly on-point and dispositive as to the issue presented here.

In addition to the express language of Section 252, the FCC has confirmed that Section 251's pricing standards (over which the state commission has authority) do not apply to checklist elements under Section 271. *Triennial Review Order,* at ¶¶ 662, 664. It "clarif[ied] that the FCC will determine whether or not the applicable pricing standards are met," either in the context of a Section 271 application for long distance authority or, thereafter, in an enforcement proceeding. *Id.* ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of Sections 201 and 202" is a fact-specific inquiry that the [FCC] will undertake in the context of a BOC's application for Section 271 authority or [once authority has been granted] in an enforcement proceeding brought pursuant to Section 271(d)(6)").[4]

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[3] *Triennial Review Order,* at ¶ 657.

[4] The FCC further explains that BellSouth might meet its burden of proof in such a proceeding by "demonstrating that the rate for a Section 271 element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its

Finally, the FCC held that "[w]here there is no impairment under Section 251 and a network element is no longer subject to unbundling, we look to *Section 271* and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements." *Triennial Review Order,* at ¶ 656 (emphasis added). The FCC went on to hold that "[s]ection 252(d)(1) provides the pricing standard 'for network elements for purposes of [Section 251(c)(3)], and does not, by its terms, apply to network elements that are required only under Section 271." *Id.* at ¶ 657 (brackets in original).

The FCC has further held that the rates for Section 271 elements are subject to the standard set forth in Sections 201 and 202 – statutes applied and enforced by the FCC. *See TRO,* at para. 656; ¶ 664 ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake ...."); also *TRO* ¶ 665 ("In the event a BOC has already received Section 271 authorization, Section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271.").

Courts, moreover, uniformly have held that claims based on Sections 201(b) and 202(a) are within the FCC's jurisdiction. Section 201(b) speaks in terms of "just and reasonable" which are determinations that "Congress has placed squarely in the hands of the [FCC]." *In Re: Long Distance Telecommunications Litigation,* 831 F.2d 627, 631 (6th Cir. 1987) (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612

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interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a Section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate." *Triennial Review Order*, at ¶ 664.

(1981)); *see also Total Telecommunications Services Inc. v. American Telephone & Telegraph Co.*, 919 F. Supp. 472, 478 (D. D.C. 1996) (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff'd.*, 99 F.3d 448 (D.C. Cir. 1997). As the D.C. Circuit noted in *Competitive Telecommunications Association v. FCC*, 87 F.3d 522, (D.C. Cir. 1996), Sections 201(b) and 202(a) "authorized the [FCC] to establish just and reasonable rates, provided that they are not unduly discriminatory." The idea of FCC regulation of local telephone service under Sections 201 and 202 is neither problematic nor novel. Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act" and required that state commission regulation be guided by FCC regulations. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 n. 6 (1999); *Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004).

Nothing in *USTA II* or in the *TRRO* disturbed the FCC ruling that Section 271 elements are subject to the FCC's jurisdiction. CompSouth's argument that this Commission is authorized to set rates for Section 271 element directly conflicts with this ruling.

CompSouth argues that that while the FCC spoke of itself as the "regulator" in charge of compliance with the Section 271 just and reasonable standard, the FCC "did not, however, establish itself as the agency in charge of arbitrating the rate levels when they are in dispute." *CompSouth's Cross-Motion,* at 32. The distinction CompSouth is trying to draw is one without a difference. The entity charged with "regulating" the rates (which in this case CompSouth admits is the FCC) is by definition the entity that must resolve the issue when the rates "are in dispute." CompSouth presumes that a regulatory body must set the rates in the first instance, but that is not

the case. Rather, the provider sets the rates in accordance with the just and reasonable standard, and the *FCC* resolves any disputes that arise surrounding those rates.

It makes sense that the FCC rules regarding Section 271 elements (*i.e.,* that the provider can set the rate initially as opposed to the regulator) are less stringent than those under Section 251. Section 251 (b) and (c) set forth the provisions that Congress deemed essential to the development of local competition and without which a CLEC is legally "impaired" within the meaning of Section 251(c) (1). Congress thus ensured that state commissions have authority to arbitrate the rates, terms and conditions of access to these elements. Conversely, the FCC has determined that CLECs are not impaired without access to Section 271 elements that no longer meet the Section 251 test. It has done so based on an evidentiary finding that competitive alternatives for such elements are readily available in the marketplace.[5] Congress did not subject access to these 271 elements to the same regulatory scrutiny. Rather, consistent with Congress's overriding intent to "reduce regulation," parties should be allowed to contract freely as to those items without state regulatory interference.[6]

2. Section 252 limits a state commission's authority to arbitrate disputes to Section 251 obligations.

Section 252, the federal law that empowers state commissions to arbitrate disputes under the Act, expressly limits that authority to disputes arising out of Section 251 obligations. Section 252(c) limits the authority of a state commission in an arbitration to "ensur[ing] that such

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[5] *See e.g., FCC's UNE Remand Order,* ¶ 471 (where a checklist item is no longer required under Section 251, a competitor is "not impaired in its ability to offer services without access to that element," which can be "acquire[d] ... in the marketplace at a price set by the marketplace.").

[6] *Id.* Under these circumstances, the FCC concluded that "it would be counterproductive to mandate that the incumbent offer[] the element" at forward looking prices." Instead, "the market price should prevail, as opposed to a regulated rate".

resolution and conditions meet the *requirements of Section 251 ....*" Congress did not grant the state commissions any authority to arbitrate compliance with the requirements of Section 271. Congress's decision not to grant the state commissions such authority is dispositive of this issue. State commissions have the authority to arbitrate Section 252 agreements, but only so far as such agreements comply with Section 251. It follows that Section 252 agreements must, therefore, be limited to Section 251 elements and obligations.

Federal decisions confirm that a state commission's authority to arbitrate under Section 252 is limited to issues arising out of the ILEC's obligations under Section 251. In *Coserv v. Southwestern Bell Telephone Company*,[7] the Fifth Circuit held that an ILEC's duty to negotiate under Sections 251 and 252 is limited to those duties necessary to implement Section 251 (b) and (c). As it explained, an "ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act," which are "those duties listed in § 251 (b) and (c)."[8] In *Coserv,* Southwestern Bell properly refused to negotiate a non-251 issue for inclusion in an interconnection agreement under Section 251. The Fifth Circuit held that the state commission correctly dismissed a petition for arbitration for lack of subject matter jurisdiction.

As with the directly relevant statutory provisions, CompSouth has no answer to this clear case law. The Fifth Circuit held that ILECs need not negotiate anything other than "those duties listed in § 251(b) and (c)" and that, if the ILEC refused to negotiate such items, they are not subject to arbitration. That holding applies directly here.

Similarly, the Eleventh Circuit has held that state commissions' arbitration authority is specifically limited to imposing the terms necessary to implement Section 251(b) and (c). In that

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[7] *Coserv v. Southwestern Bell Telephone,* 350 F.3d 482 (5th Cir. 2003).
[8] Id. at 487-88.

court's words, a rule mandating arbitration of items not covered by those parts of Section 251 would be "contrary to the scheme and text of th[e] statute, which lists only a limited number of issues on which incumbents are mandated to negotiate."[9] Additionally, and as discussed in BellSouth's original memorandum, other federal courts have also concluded that "the enforcement authority for § 271 unbundling duties lies with the FCC," and any BellSouth conduct under that provision "must be challenged there first."[10] CompSouth relies on a single federal court decision that allegedly supports their position, while ignoring the most recent decision on this issue.

Most recently, on June 9, 2005, a federal district court held that Section 252 did not authorize a state commission even to approve a negotiated agreement for line sharing between Qwest and Covad.[11] It reasoned that Section 252 did not apply to this "commercial agreement" because line sharing "is not an element or service that must be provided under Section 251."[12] This decision squarely conflicts with CompSouth's contention that, under Section 271(c)(2)(A), Section 271 elements must be contained in a Section 252 interconnection agreement. That is because if a state commission cannot even approve a negotiated agreement that does not involve Section 251 items, it certainly cannot *arbitrate* terms that are not mandated by Section 251, where, as discussed above, Congress expressly limited the state commissions' authority to implementing Section 251.

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[9] *MCI Telecomm. Corp. v. BellSouth Telecomms., Inc.* 298 F.3d 1269, 1274 (11th Cir. 2002).

[10] *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, slip op. 12. *Accord, BellSouth Telecommunications, Inc. v. Mississippi PSC*, slip op. 17.

[11] It is curious that CompSouth did not cite to this decision since the underlying contract in dispute was between Qwest and Covad. Presumably Covad, a signatory to the CompSouth's Cross-Motion in this docket, would have had some interest in the outcome of that case.

[12] *Qwest Corp. v. Schneider, et al.*, CV-04-053-H-CSO, at 14 (D. Mass. June 9, 2005) attached hereto as Exhibit A.

Instead of addressing the most recent federal court decision, CompSouth cites to *Qwest Corporation v. Minnesota Public Service Commission,* 2004 WL 1920970 (D. Minn. 2004), as support for the claim that Section 271 elements belong in Section 252 agreements. That decision, however, is clearly distinguishable because the FCC, ruling on the same fact pattern, reached a different conclusion about Section 252 in the *Qwest ICA Order*. In the *Qwest ICA Order*, the FCC found that "*only* those agreements that contain an ongoing obligation relating to Section 251(b) or (c) must be filed under [Section] 252(a)(1)."[13] The FCC reiterated this interpretation throughout the Order, noting that while "a settlement agreement that contains an ongoing obligation relating to Section 251(b) or (c) must be filed under Section 252(a)(1)," "settlement contracts that *do not affect an incumbent LEC's ongoing obligations relating to Section 251 need not be filed.*"[14] This finding is consistent with the FCC's Notice of Apparent Liability for Forfeiture against Qwest for failing to file interconnection agreements and provisions containing and relating to Section 251(b) and (c) obligations. *See Qwest Corporation, Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, FCC 04-57 (2004).

CompSouth also attempts to distinguish the recent federal decisions in Kentucky and Mississippi on this issue, but this attempt is unavailing. Both of those courts specifically held

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[13] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, n. 26 (2002) ("Qwest ICA Order") (emphasis added).

[14] Qwest ICA Order, ¶ 12 (emphasis added); *see also Id*, ¶ 9 (only those "agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in Sections 251(b) and (c)" must be filed under Section 252).

that decisions regarding 271 obligations rested with *the FCC*.[15] An attempt by a state commission to set rates or terms and conditions for Section 271 elements would directly conflict with federal court precedent.[16]

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[15] *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al.*, Civil Action No. 3:05CV173LN, *Memorandum Opinion and Order* (S.D. Miss. Apr. 13, 2005) ("*Mississippi Order*"), *2005 U.S. Dist. LEXIS 8498*, p. 17 of slip opinion; *BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.*, Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order*, (E.D. Ky. Apr. 22, 2005) ("*Kentucky Order*"), p. 12 of slip opinion.

[16] Indeed, CompSouth conceded that some state commissions, including the state commissions of Texas and Kansas, have declined to include Section 271 checklist items in Section 252 interconnection agreements. CompSouth likewise acknowledged BellSouth previously cited to analogous decisions from commissions in Utah, Washington, North Carolina, and New York (as well as the federal court decisions in Mississippi and Kentucky). The CLECs attempt to counter these decisions by relying upon a decision of the Tennessee Regulatory Authority ("TRA"), which is the subject of an ongoing preemption petition before the FCC and which petition the TRA acknowledged "could provide clarification regarding state authority . . . for 271 elements." Docket No. 04-00186, Order dated July 20, 2005, at p. 7. CompSouth also alludes to preliminary arbitrators' decisions from Oklahoma and Missouri. BellSouth understands the Missouri Commission has adopted the arbitrator's decision; BellSouth anticipates that decision will be subject to further review. CompSouth further relies on an Illinois decision, which is the subject of a pending Motion for Review/Reconsideration, and a Maine Supreme Court decision. The Maine Supreme Court decision is clearly distinguishable, as the Court relied upon language in a state tariff that permitted "the use by one public utility or cable television system of the conduits, subways, wires, poles ... or any part of them ... belonging to another." There is no such joint statutory use state statute in South Carolina.

Three more recent decisions are directly relevant. First, on July 14, 2005, the Massachusetts Department of Telecommunications and Industry entered its *Arbitration Order* in Docket No. D.T.E. 04-33. The *Arbitration Order* included a number of issues that are similar to the issues established by this Commission, including, but not limited to, Section 271 and line sharing. Specifically, the Massachusetts Commission held that "our authority to review and approve interconnection agreements under § 252 does not include the authority to mandate that Verizon include § 271 network elements in any of its § 252 interconnection agreements." *See* p. 251. Also, the Massachusetts Commission ordered that the "FCC's line sharing rules, which by their terms were effective on October 2, 2003 and sunset on October 2, 2006, are codified at 47 C.F.R. §51.319(a)(1)(i). Parties are directed to include the line sharing rules verbatim in the Agreement." *See* p. 185. Second, the Kansas Corporation Commission entered its *Order No. 15: Commission Order on Phase II UNE Issues* addressing a prior recommendation of an arbitrator in Docket Nos. 05-BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 867 on July 18, 2005. In relevant part, the Kansas Commission held that "the FCC has preemptive jurisdiction over 271 matters." *See* ** 7 – 8. Third, also on July 18, 2005, the Idaho Public Utilities

3. Section 271 does not authorize the Commission to set rates or arbitrate Section 251 elements.

To make its arguments, CompSouth ignores all of the express limitations on state commission authority in Section 252 and the relevant case law; instead, it relies on Section 271(c)(2)(A)'s reference to "agreements that have been approved under Section 252." By its terms, however, that Section expressly refers *only* to "approv[al]" of agreements under Section 252. *It says nothing about state commission arbitration or rate-setting authority.* The limitations on rate-setting and arbitration are directly relevant here because CompSouth wants this Commission to arbitrate issues around, and set rates for, the Section 271 elements. The issue before this Commission, therefore, goes far beyond the scope of the Commission's authority to approve agreements, yet that is the extent of the statutory provision in Section 271 upon which CompSouth relies.

Rather, CompSouth's argument utterly disregards the provision that expressly limits state rate-setting authority. And, crucially, Congress made no mention of including Section 271 elements in negotiations under Sections 251(c)(1) and 252(a)(1), arbitration under Section 252(b), or state commission resolution of open issues under Section 252(c). Most importantly for present purposes, Congress did not give state commissions *any* rate-setting

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Commission entered an order in an arbitration proceeding between Covad and Qwest in Case No. CVD-T-05-1; Order No. 29825; *2005 Ida. PUC LEXIS* 139. The Idaho Commission concluded "that the Commission does not have the authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement."

authority for Section 271 requirements in Section 252(d)(1). On the contrary, *all* of those Sections are explicitly linked – and limited – to implementation of Sections 251(b) and (c).

CompSouth also argues that Section 271(c)(1) provides that "the terms and conditions for the checklist items in Section 271 must be in an approved interconnection agreement." *CompSouth's Cross-Motion,* at 12. Section 271(c)(1) says nothing of the sort. Section 271(c)(1) provides that to comply with Section 271, a BOC must meet the requirements of either subparagraph (A) or (B). Subparagraph (A), in turn, provides that a BOC meets the requirements of the Section if it "has entered into one or more binding agreements that have been approved under Section 252 ...." The Section 252 agreements referenced in that Section refer to agreements that incorporate the required Section 251 elements – nothing is said about Section 271 elements. All that Section 271(c)(1) requires is that the BOC needs either approved Section 252 agreements or an SGAT to obtain Section 271 authority. It says nothing about incorporating Section 271 elements into the Section 252 agreements (nor would it, because such a requirement would conflict with the express limitations in Section 252 addressed above).

4. Section 271 vests enforcement over Section 271 elements with the FCC.

Section 271 itself vests exclusive authority over the enforcement of Section 271 obligations with *the FCC. See Section* 271(d)(6). Thus, while CompSouth claims that BellSouth wants "sole control over the terms and conditions that apply to the Section 271 checklist items," that is not the case. *See CompSouth's Cross-Motion,* at 11. If there is an issue of whether BellSouth is meeting its Section 271 obligations through approved agreements or otherwise, Congress was explicit as to what body should address whether BellSouth is in compliance. Section 271(d) authorizes the FCC, not this Commission, both to approve 271 applications and to determine post-approval compliance. If CompSouth is concerned about BellSouth's Section 271

compliance, the place to raise that concern is the FCC, not this Commission. In the FCC's words, that federal agency has **"exclusive authority"** over the entire "Section 271 process." [17]

CompSouth spent extensive time trying to distinguish what it concedes to be the FCC's exclusive enforcement authority over Section 271 from what it calls the state commission's "Section 252 authority." *See CompSouth's Cross-Motion,* at 27-33. The obvious flaw in this argument is that, as demonstrated above, Section 252 does not confer any jurisdiction over Section 271 elements to the state commissions – in fact, it expressly limits state commission authority to set rates and arbitrate to *Section 251* obligations.

Furthermore, the arrangement advocated by CompSouth would be unworkable as a practical matter. Under CompSouth's argument, Section 252 interconnection agreements would contain both Section 251 and 271 elements. CompSouth concedes, however, that the state commission has no enforcement authority over Section 271 elements. *See CompSouth's Cross-Motion,* at 27 ("CompSouth does not contend that if the Section 271 checklist items are not in the ICA that the Commission has the enforcement authority to revoke BellSouth's long distance entry or otherwise sanction BellSouth"). Thus, under CompSouth's theory, state commissions would enforce certain parts of an interconnection agreement (*i.e.*, the 251 elements) and the FCC would enforce other parts (*i.e.,* the 271 elements) of the same agreement. That scenario, of course, makes no sense.

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[17] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona,* 14 FCC Rcd 14392, 14401-02, ¶ 18 (1999) (emphasis added); see also this Commission's Order dated May 25, 2005, *In re: Competitive Carriers of the South, Inc.*, in Docket No. 29393, at p. 18 (". . . ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of §271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission.")

5. **State law does not empower the Commission to include Section 271 elements in a Section 252 agreement.**

CompSouth make the incredible argument that because there was no "express discussion on preemption in the *TRO* or in the *TRRO* concerning any preemption possibilities for Section 271," *CompSouth's Cross-Motion* at 26, the Commission can act under state law to include Section 271 elements in interconnection agreements. This argument is nonsense, because it utterly ignores that fact that Section 252 agreements and Section 271 elements are creatures of *federal law*, not of state law, and thus the obligations surrounding them are set forth in the federal statute. And, as discussed above, the federal statute clearly delineates the state commissions' authority (rate-setting and arbitration for Section 251 elements) and FCC authority (Section 271 enforcement).

Even if the preemption analysis were valid here, which it is not, FCC precedent is explicit that state commissions are not to be involved in rate-setting for Section 271 elements. In the *Triennial Review Order,* the FCC held that "Section 252(d)(1) is quite specific that it only applies for the purposes of implementation of Section 251(c)(3) – meaning only that there has been a finding of impairment with regard to a given network element." *TRO,* at ¶ 657. The FCC recognized that the distinction between Section 251 elements and Section 271 elements was critical because it "allow[ed] [the FCC] to reconcile the interrelated terms of the Act so that one provision (Section 271) does not gratuitously reimpose the very same requirements that another provision (Section 251) has eliminated." *Id.* at ¶ 659. Allowing state commissions to set the rates for Section 271 elements would be "gratuitously reimpos[ing]" the same obligations on elements that are not subject to Section 251 obligations.

Finally, CompSouth's Cross-Motion makes no mention whatsoever of the fact (discussed on page 22 of BellSouth's Motion) that state law requires that any unbundling requirements

established by the Commission "shall be consistent with applicable federal law . . . ."[18] Nor does CompSouth's Cross-Motion address the fact that the Commission has entered an Order stating that it will implement the unbundling provisions of section 58-9-280 "by concurring with the Federal Telecommunications Act of 1996."[19] Clearly, this state statute does not (and cannot) grant the Joint Petitioners unbundled access to items that the FCC has determined are not subject to the federal Act's unbundling requirements.

ISSUE 17: Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?

Rather than respond to all of CompSouth's rhetoric, BellSouth will make three salient points in rebuttal. First, the language of Section 271 does not require line-sharing. Checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services."[20] The FCC has authoritatively defined the "local loop" as a specific "transmission facility" between a LEC central office and the demarcation point on a customer premises.[21] BellSouth thus meets its checklist item 4 obligation by offering access to unbundled loops and the "transmission" capability on those facilities.[22] CompSouth argues that because the

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[18] S.C. Code Ann. §58-9-280(C)(emphasis added).

[19] *See* Order Implementing Requirements, *In Re: Generic Proceeding to Address Local Competition in the Telecommunications Industry in South Carolina*, Order No. 96-545 in Docket No. 96-018-C at pp. 1-2 (August 9, 1996)(emphasis added).

[20] 47 U.S.C. § 271(d)(2)(B)(iv).

[21] 47 C.F.R. § 51.319(a).

[22] The Joint CLECs cite to FCC 271 orders for the proposition that line sharing is a Section 271 obligation, yet offer no explanation for the fact that neither New York nor Texas were required to offer line sharing to obtain Section 271 approval. If line sharing actually had been required in order to receive long distance authority under checklist item 4, then the FCC could not have granted Verizon and SBC Section 271 authority. *See In the Matter of Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* CC Docket No. 99-295, 15 FCC Rcd 3953 (Dec. 22, 1999); *In the Matter of Application by SBC Communications, Inc., et al.; Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65, 15 FCC Rec'd 18354 (June 30, 2000).

high frequency portion of the loop ("HFPL") is "a complete transmission path," that it constitutes "a *form of* 'loop transmission facility'" under checklist item 4. This argument is simply wrong. To make it, CompSouth must ignore the portion of the definition of HFPL that defines HFPL as a "complete transmission path *on the frequency range above the one used to carry analog circuit switched voice transmissions*...." In other words, the HFPL is only part of the facility --- not the entire "transmission path" required by checklist item 4.

A simple but appropriate analogy makes the point --- it is as if one ordered a birthday cake from a bakery but received only the icing. Certainly the buyer would not consider the icing alone a "form" of birthday cake. On the contrary, the requirement was the entire cake, not just the icing portion of it, just as checklist item 4 requires the entire transmission facility, not just the high frequency portion of it.

Second, the FCC's transition plan demonstrates that the HFPL is not a checklist item 4 requirement. The *Triennial Review Order* establishes a carefully calibrated transition that establishes specific *rates* that CLECs must pay in those limited instances where they can still obtain the HFPL.[23] Under CompSouth's theory, however, the FCC's elaborate and carefully crafted transition applies only to non-BOC ILECs, very few, if any, of whom sell line sharing.[24] It defies logic that the FCC created such a transition plan for such a handful of lines. Moreover, CompSouth argues that CLECs can obtain the HFPL indefinitely and at rates other than the ones specifically established by the FCC simply by requesting access to those facilities under Section 271 instead of Section 251. That position is contrary to the FCC's express conclusion that

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[23] *See Triennial Review Order* ¶ 265.

[24] *Id.*, ¶660 (only approximately 2.5 percent of ILEC switched access lines are served by LECs that are neither BOCs nor rural telephone companies exempt from Section 251 unbundling).

"access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled *creates better competitive incentives.*"[25] CompSouth has provided absolutely no reason to believe that, having required access to the whole loop under Section 251, the FCC has nevertheless authorized access to just the HFPL under Section 271 -- and thus created the very anti-competitive consequences it sought to avoid in the *Triennial Review Order*. There is no basis to conclude that the FCC, having eliminated these anti-competitive consequences under Section 251, has allowed these *same* untoward effects to go on unchecked under Section 271. On the contrary, in its recent *BellSouth Declaratory Ruling Order*, the FCC again stressed that, under its rules, "a competitive LEC officially leases the entire loop." Moreover, that order specifies that the HFPL is available "*only* under an express three-year phase out plan."[26] *Id.* ¶ 5 n. 10 (emphasis added).

Third, CompSouth argues that, whatever else may be disputed, FCC Chairman Martin's statement regarding line sharing confirms that it is a Section 271 obligation. In a similar vein, CompSouth asserts that, by making the forbearance argument at all, BellSouth necessarily concedes that line sharing is a Section 271 element.

There is nothing inconsistent about BellSouth's *alternative* argument that, if any Section 271 obligation existed, the FCC has granted forbearance. BellSouth has never in any forum conceded that any of the broadband elements included in its Petition for Forbearance are Section 271 elements. In fact, BellSouth affirmatively stated in its Petition that it "believes that no such obligation exist[s]" for "any of the broadband elements" included therein.[27] Rather than engage in lengthy litigation over this issue in 51 states, however, BellSouth filed its Petition "in an

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[25] *Triennial Review Order* ¶ 260.
[26] *Id.* at para. 5, n. 10.
[27] *See* BellSouth Petition for Forbearance, at p. 1.

abundance of caution," asking for forbearance of any such obligation, assuming one were to find such an obligation existed. The FCC does not spend any time in its Forbearance Order analyzing or finding that broadband elements are Section 271 elements. This is not surprising, given that there is no need for lengthy debate of this point (either at the FCC or here) if, assuming that they are 271 elements, the FCC will forbear from enforcing any such 271 obligations. Thus, as Chairman Martin concluded: "Since line sharing was included in their request for broadband relief, and we affirmatively grant their request, I believe today's order also forbears from *any Section 271 obligation with respect to line sharing*." [28]

CompSouth further argues that BellSouth's petition did not include line sharing and, thus, was not included in the relief granted. No CompSouth argument, however, can obscure the fact that this is precisely what Chairman Martin specifically concluded in his separate statement. Nor does CompSouth's argument in any way rebut BellSouth's discussion in its Motion of the FCC's own conclusions with respect to the scope of the relief requested. The FCC stated in its Forbearance Order that, "Although Verizon's Petition was ambiguous with regard to the exact scope of relief requested, later submissions ... clarify that Verizon is requesting forbearance relief only with respect to those broadband elements for which the Commission made a national finding relieving incumbent LECs from unbundling under Section 251(c)."[29] And with respect to these "later submissions," the FCC cited to the very March 26, 2004 *ex parte* filing upon which BellSouth relies. Thus, the RBOC petitions *did* include line sharing, and, "while the Commission did not specifically address line sharing in [its] decision," because it was "included

[28] *See* Separate Statement of Commissioner Kevin Martin.
[29] *See* FCC's Forbearance Order, ¶ 2, n. 9.

in their request for broadband relief and we affirmatively grant their request, ..." the "order also forbears from any Section 271 obligation with respect to line-sharing."[30]

CONCLUSION

For the reasons set forth herein and in BellSouth's Opening Brief, BellSouth respectfully requests that the Commission grant either summary judgment or a declaratory ruling (as appropriate) in favor of BellSouth on each of the issues set forth in its opening brief.

Respectfully submitted,

Patrick W. Turner with permission NMC

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[30] *See* Statement of Kevin J. Martin, Broadband Forbearance Order. In any event, and as the commissioner further concluded, "Regardless of whether it was affirmatively granted, because the Commission's decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute." CompSouth does not dispute this point other than to claim in the first instance - wrongfully as explained herein - that BellSouth did not request relief for line sharing.

EXHIBIT A

FILED, ENTERED AND NOTED IN
CIVIL JUDGMENT BOOK 38
JUNE 10, 2005
PATRICK E. DUFFY, CLERK
By

United States District Court

FOR THE DISTRICT OF MONTANA
HELENA DIVISION

QWEST CORPORATION, a Colorado corporation Plaintiffs, vs. **THOMAS J. SCHNEIDER, GREG JERGESON, MATT BRAINARD, JAY STOVALL, and BOB ROWE in their official capacities as Commissioners of the Montana Public Service Commission, and THE MONTANA PUBLIC SERVICE COMMISSION, a regulatory agency of the State of Motnana** Defendants.	**JUDGMENT IN A CIVIL CASE** **CASE NUMBER: CV-04-053-H-CSO**

IT IS ORDERED AND ADJUDGED that Qwest's Motion for Judgment on Appeal is GRANTED in part and DENIED in part as follows:

(1) The CLSA at issue herein is not subject to review and approval by the Defendants under section 252 of the FTA.

(2) The PSC's Final Order and Order on Reconsideration issued on September 22, 2004, is therefore VACATED.

FILED ENTERED AND NOTED
IN CIVIL JUDGMENT BOOK
VOLUME , PAGE

(3) All other requested relief is DENIED. The Court determines that Qwest's request for prospective injunctive relief is overly broad and goes beyond the narrow issue presented in this action.

Dated this 9th day of June, 2005.

PATRICK E. DUFFY, CLERK

BY RENATE WELDELE COURT SEAL

RENATE WELDELE, DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

QWEST CORPORATION, a Colorado corporation, Plaintiff, vs. THOMAS J. SCHNEIDER, GREG JERGESON, MATT BRAINARD, JAY STOVALL, and BOB ROWE in their official capacities as Commissioners of the Montana Public Service Commission, and THE MONTANA PUBLIC SERVICE COMMISSION, a regulatory agency of the State of Montana, Defendants.	CV-04-053-H-CSO **ORDER ON QWEST'S MOTION FOR JUDGMENT ON APPEAL**

Plaintiff Qwest Corporation ("Qwest") initiated this action seeking declaratory and injunctive relief against the Montana Public Service Commission ("PSC") and the PSC Commissioners in

their official capacities. Qwest challenges a PSC order concerning an agreement between Qwest and DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"). Qwest generally alleges that the PSC exceeded its authority under the Federal Telecommunications Act of 1996 ("FTA") by requiring Qwest to file the agreement, and by ordering a substantive change to its terms and conditions.[1]

In seeking federal judicial review of the PSC's decision, Qwest relies upon 47 U.S.C. § 252(e)(6) of the FTA,[2] and relies upon that provision and 28 U.S.C. § 1331 in invoking the Court's jurisdiction.[3] By Order filed February 22, 2005, Chief Judge Molloy, with the parties' consent, assigned this case to the undersigned for all purposes.[4]

Before the Court is Qwest's Motion for Judgment on Appeal.[5]

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[1]Complaint ("Cmplt.") (Court's Doc. No. 1) at 1, 12-23.

[2]Id. at 3. 47 U.S.C. § 252(e)(6) provides, in relevant part:

> (e) Approval by State commission
>
> * * *
>
> (6) Review of State commission actions
>
> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

[3]Cmplt. at 3.

[4]Court's Doc. No. 28.

[5]Plaintiff Qwest Corporation's Motion for Judgment on Appeal ("Qwest's Mtn.") (Court's Doc. No. 31).

On June 1, 2005, following submission of the parties' briefs,[6] the Court heard oral argument on Qwest's motion. Having reviewed the record, and having considered the parties' arguments, the Court is prepared to rule.

I. THE TELECOMMUNICATIONS ACT OF 1996.

"Congress passed the [FTA] to foster competition in local and long distance telephone markets by neutralizing the competitive advantage inherent in incumbent carriers' ownership of the physical networks required to supply telecommunications services."[7] To accomplish this objective, Congress, through the FTA, changed significantly the regulatory scheme that governed local telephone service. The FTA "restructured local telephone markets by eliminating state-granted local service monopolies," and replaced exclusive state regulation of local monopolies with a competitive scheme set forth in 47 U.S.C. §§ 251 and 252.[8]

The FTA, under sections 251 and 252,[9] requires established

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[6]On March 2, 2005, Qwest filed Qwest Corporation's Opening Brief in Support of Judgment on Appeal ("Qwest's Opening Brief"). On April 29, 2005, Defendants filed their Response Brief of Defendants Montana Public Service Commission and Bob Rowe, Thomas J. Schneider, Matt Brainard, Jay Stovall and Greg Jergeson ("PSC's Brief") (Court's Doc. No. 34). On May 17, 2005, Qwest filed Qwest Corporation's Reply Brief in Support of Judgment on Appeal ("Qwest's Reply") (Court's Doc. No. 35).

[7]Pacific Bell v. Pac-West Telecomm., Inc., 325 F.3d 1114, 1117-18 (9th Cir. 2003) (citations and footnotes omitted).

[8]MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491, 498 (3d Cir. 2001)("MCI Telecomm.")(citing AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 370 (1999) ("Iowa Util.")).

[9]Hereafter, all references to code sections are to sections of Title 47 of the United States Code unless otherwise indicated.

incumbent local exchange carriers ("ILECs") (defined in 47 U.S.C. § 251(h)(1)) to allow competitive local exchange carriers ("CLECs") access to the ILECs' existing networks or services to permit the CLECs to compete in providing local telephone services.[10]

Generally, both ILECs and CLECs have the duty under section 251(a) "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[.]"[11] Sections 251 and 252 also set forth specific requirements.

Section 251(b) imposes requirements on both ILECs and CLECs. It requires them to: (1) allow resale of their telecommunications services; (2) provide number portability; (3) provide dialing parity; (4) provide access to rights-of-way; and (5) establish reciprocal compensation arrangements.[12]

Section 251(c) imposes requirements applicable only to ILECs. It requires ILECs to: (1) provide interconnection of the ILEC's network to other networks; (2) provide access to unbundled network elements ("UNEs")[13]; (3) allow CLECs to resell services at wholesale rates; and (4) provide for collocation of CLEC

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[10] Pacific Bell, 325 F.3d at 1118; see also US West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1116 (9th Cir. 1999).

[11] Section 251(a)(1).

[12] Sections 251(b)(1)-(5).

[13] UNEs are discrete components of an existing ILEC's network. US West Communications v. Jennings, 304 F.3d 950, 954 (9th Cir. 2002).

equipment in ILEC buildings.[14] Also, section 251(c)(1) requires ILECs to "negotiate in good faith" the "terms and conditions of agreements" that permit CLECs to share the network and to provide service.[15]

Section 252 governs the process for establishing interconnection agreements between ILECs and CLECs, and provides that negotiated or arbitrated interconnection agreements must be submitted to state public utility commissions for approval. Section 252 provides, in relevant part, as follows:

> (a) Agreements arrived at through negotiation
>
> (1) Voluntary negotiations
>
> Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.
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> * * *
>
> (e) Approval by State commission
>
> (1) Approval required

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[14]Sections 251(c)(2)-(4) and (6).

[15]Section 251(c)(1).

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.[16]

Congress empowered the Federal Communications Commission ("FCC") to promulgate regulations to implement the FTA's requirements.[17] "[T]he FCC's implementing regulations ... must be considered part and parcel of the requirements of the [FTA]."[18]

II. BACKGROUND.

The parties do not dispute the underlying facts.[19] Under the FTA, Qwest is an ILEC and Covad is a CLEC. In early 2004, Qwest and Covad successfully negotiated a line-sharing agreement.[20] Line sharing involves simultaneous use of both the high frequency and low frequency portions of the copper wire or "loop" that connects an end user to a telecommunications network.[21] Companies like Qwest provide high-speed access to the Internet through a service known as a Digital Subscriber Line

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[16]Sections 252(a)(1) and 252(e)(1).

[17]Section 251(d)(1); Iowa Util., 525 U.S. at 384.

[18]Jennings, 304 F.3d at 957.

[19]See Qwest's Preliminary Pretrial Statement (Court's Doc. No. 23) at 2; Preliminary Pretrial Statement of Defendants (Court's Doc. No. 22) at 3.

[20]Complaint Exhibit ("Cmplt. ex.") 2; PSC's Brief at ex. 5.

[21]Qwest's Opening Brief at 14.

("DSL"). DSL service is provided by equipment that splits the frequency of the loop, allowing simultaneous use of the high frequency portion for connection to the Internet, and the low frequency portion for voice communications. The line sharing agreement between Qwest and Covad gives Covad access to line sharing in Qwest's 14-state region for a period that commenced on October 2, 2004.[22]

On May 19, 2004, Qwest and Covad filed with the PSC their agreement, which is titled "Terms and Conditions for Commercial Line Sharing Arrangements" ("Commercial Line Sharing Agreement" or "CLSA").[23] In a separate letter,[24] Qwest informed the PSC that it filed the agreement "for informational purposes only," and that it was not filing the agreement for approval under section 252's requirement that agreements be submitted to state commissions for approval.

On June 3, 2004, the PSC issued an Order to Show Cause and Request for Information[25] directing Qwest and Covad, and allowing any interested parties, to comment about why the CLSA should not be filed and considered by the PSC under sections 251 and 252.

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[22]Id. at 18.

[23]Cmplt. ex. 2.

[24]Cmplt. ex. 1.

[25]Cmplt. ex. 3.

On June 18, 2004, Qwest, Covad and others filed comments.[26]

On July 9, 2004, the PSC entered a Notice of Application for Approval of Commercial Line Sharing Agreement for DSL Services ("Notice").[27] In the Notice, the PSC concluded that the CLSA "is a negotiated agreement pursuant to §§ 251 and 252 of the [FTA,]" stated that it requires PSC approval prior to implementation and set a procedural schedule for considering whether to approve or reject the CLSA. On July 28, 2004, Qwest filed with the PSC a Motion for Reconsideration and to Dismiss.[28]

On September 22, 2004, the PSC issued its Final Order and Order on Reconsideration ("Final Order").[29] The PSC approved the CLSA with the exception of one provision that dealt with the timing of notice required before disconnection of services.

On October 21, 2004, Qwest filed the instant action.[30] Qwest seeks: (1) a declaratory ruling that the Final Order violates section 252; and (2) entry of a permanent injunction to prevent the PSC from enforcing the Final Order against Qwest with

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[26]Cmplt. exs. 4 (Qwest's comments), 5 (Covad's comments) and 6 (Qwest's reply comments). Other entities' comments are found in the Notice of Transmittal of Administrative Record (Court's Doc. No. 14).

[27]Cmplt. ex. 7.

[28]Cmplt. ex. 8.

[29]Cmplt. ex. 9.

[30]Cmplt. at 1.

respect to the CLSA.[31]

III. STANDARD OF REVIEW.

The Court must consider de novo the Montana PSC's interpretation of the FTA and of the FCC's implementing regulations.[32]

IV. DISCUSSION.

The narrow legal issue before the Court is whether the CLSA is an "interconnection agreement" that must be submitted to the PSC for approval under the FTA. The issue of whether the PSC may require agreements to be filed is not before the Court, and the Court takes no position herein on that issue.[33]

The parties agree that line sharing does not fall within the obligations of an ILEC as set forth in sections 251(b) and (c), *i.e.*, line sharing is not a UNE under section 251(c)(3).[34] The

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[31]Qwest's Opening Brief at 1; Cmplt. at 16-23.

[32]US West Communications v. MFS Intelenet, Inc., 193 F.3d at 1117 (citing Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997), for proposition that state agency's interpretation of a federal statute is considered de novo).

[33]See, e.g., Order Directing Qwest to File Commercial Agreements, In the Matter of the Commission Investigation Regarding the Status of the Commercial Line Sharing Agreement Between Qwest Corporation and DIECA Communications d/b/a Covad, 2004 WL 2465819 (Minn. PUC, September 27, 2004)(Minnesota Public Utilities Commission directing "Qwest to file its commercial agreements with the Commission, whether or not those agreements constitute 'interconnection agreements' for purposes of the [FTA]" noting, *inter alia*, that "[r]eviewing such agreements will provide the Commission with information about the evolution of competition in the state generally.").

[34]Counsel for the PSC conceded this point at oral argument. The PSC's concession is consistent with the FCC's determination that ILECs are not

parties disagree, however, with respect to the issue of whether the line sharing agreement between Qwest and Covad is nevertheless an interconnection agreement that must be submitted to the PSC for approval.

Qwest generally argues that it has no obligation to file any agreements that relate to services that it, as an ILEC, is not required to provide,[35] and that state commissions have no authority to impose requirements upon ILECs that the FTA does not impose. Qwest argues that the PSC, in taking action with respect to Qwest's CLSA with Covad, "improperly asserted authority over an agreement that does not address a section 251(b) or (c) service or element and hence is not an 'interconnection agreement' governed by that section of the [FTA]."[36]

It is Qwest's position that "[a] simple analysis of the interplay between sections 251 and 252 demonstrate[s] that there is no statutory basis to conclude that the [CLSA] must be filed."[37] Specifically, Qwest argues that there are only two

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required to provide line sharing as an unbundled network element under section 251(c)(3), Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978, ¶¶ 255, et seq. (2003)("Triennial Review Order" or "TRO"), a conclusion that the D.C. Circuit Court of Appeals has expressly upheld. United States v. Telecom Ass'n v. FCC, 359 F.3d 554, 584-85 (D.C. Cir. 2004) ("USTA II").

[35]Qwest's Opening Brief at 7.

[36]Id. at 10.

[37]Id. at 24-25.

provisions of section 252 that discuss the obligation of parties to file agreements with state commissions, and neither requires submission of the CLSA to the PSC.

The first provision is section 252(a)(1). Qwest argues that the provision's requirement that an agreement be submitted to the state commission is expressly premised on the agreement being for services or elements provided "pursuant to section 251." Because line sharing is not a service or element provided pursuant to section 251, Qwest argues, the CLSA need not be submitted to the PSC for approval.

The second provision is section 252(e)(1). As noted *supra*, it provides that any "interconnection agreement adopted by negotiation ... shall be submitted to the State commission." Qwest argues that the reference to agreements "adopted by negotiation" refers to section 252(a)(1) agreements which, as already discussed, relate only to services or elements provided pursuant to section 251. Again, because line sharing is not a service or element provided pursuant to section 251, Qwest argues, the CLSA need not be submitted to the PSC for approval.

In sum, Qwest argues that because it and Covad were not obligated to submit their CLSA to the PSC for approval, the PSC exceeded its authority when it took action on the CLSA.

The PSC first argues that section 252's plain language

dictates that the CLSA must be submitted to it for approval.[38] The PSC argues that the purpose of section 252(a)(1)'s first sentence "is to reward carriers for independently contracting for interconnection and provisioning of goods and services" and to relieve them from the substantive requirements of sections 251(b) and (c).[39] The sentence, the PSC argues, does not relieve carriers entering voluntary agreements from submitting their agreements to the state commissions for approval. Also, the PSC argues that "[n]othing in section 252(e)(1) limits the filing requirement of interconnection agreements to those that implement duties contained in §§ 251(b) and (c)."[40]

Second, the PSC argues that FCC orders support its position that the CLSA must be submitted to it for approval. The PSC argues that the FCC, in its order on the scope of section 252(a)(1)'s requirement for submission of agreements to state commissions for approval, encouraged state commissions to decide in the first instance which sorts of agreements must be submitted.[41] The PSC argues that the FCC, in a subsequent order, "reiterated the role of state commissions in determining in the

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[38]PSC's Brief at 8-14.

[39]Id. at 9.

[40]Id. at 12.

[41]Id. at 14-18 (citing Memorandum Opinion and Order, In the Matter of Qwest Communications International, Inc., Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), WC Docket No. 02-89, 17 FCC Rcd 19337, 2002 WL 31204893 (Oct. 4, 2002) ("Declaratory Order")).

first instance what interconnection agreements must be filed."[42]

Third, the PSC argues that the CLSA is subject to section 252's submission requirement because the networks of Qwest and Covad are physically linked. This physically linking, the PSC argues, makes the CLSA an "interconnection agreement" under section 251, and thus subject to submission to the PSC under section 252.

Fourth, the PSC argues that its interpretation of section 252 is entitled to the Court's deference under Chevron USA Inc. v. Natural Resources Defense Council, Inc.[43] The PSC argues that because its interpretation of section 252 is reasonable, the Court should afford that interpretation deference.

Finally, the PSC argues that section 252's requirement for submission of agreements is not limited to agreements that contain the FCC's current list of unbundled network elements. The PSC argues that it and other state commissions are permitted to expand the list of network elements that must be made available to CLECs "as long as state requirements are consistent with and do not substantially prevent implementation of § 251 and the purposes of the [FTA]."[44]

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[42]Id. (citing In the Matter of Qwest Corporation Apparent Liability for Forfeiture, File No. EB-03-IH-0263 (March 12, 2004)("NAL")).

[43]Id. at 22-26 (citing Chevron, 467 U.S. 837, 842-43 (1984)).

[44]Id. at 27.

Having considered all of the parties' arguments, the Court concludes that section 252's language limits the requirement that agreements be submitted to state commissions for approval to those agreements that contain section 251 obligations. Because line sharing, which is the subject of Qwest's CLSA with Covad, is not an element or service that must be provided under section 251, there is no obligation to submit the CLSA to the PSC for approval under section 252.

As Qwest argues, section 252(a)(1)'s requirement that an agreement be submitted to a state commission is expressly premised on the agreement being for interconnection, services or network elements provided "pursuant to section 251." Here, as the parties agree and as relevant authority establishes, line sharing is not a service or element provided pursuant to section 251. Therefore, Qwest's CLSA with Covad is not the type of agreement contemplated in section 252(a)(1) that must be submitted to the PSC for approval.

Similarly, section 252(e)(1) requires submission to the state commission any "interconnection agreement adopted by negotiation ...." The reference to any agreement "adopted by negotiation" refers to section 252(a)(1) agreements which, as noted, involve only those services provided "pursuant to section 251." Again, line sharing is not a service or element provided pursuant to section 251. Thus, the CLSA at issue is not an "interconnection agreement" as contemplated in section 252, and

thus need not be submitted to the PSC for approval. The PSC's argument that section 252's language dictates a contrary result is unpersuasive.

The Court believes that its conclusion that the CLSA at issue need not be submitted to the PSC for approval is consistent with the FCC's interpretation of the statute's language. In the Declaratory Order, the FCC expressly concluded that "only those agreements that contain an *ongoing obligation relating to section 251(b) or (c)* must be filed under section 252(a)(1)."[45] The PSC's argument that the FCC's orders support its position ignores the clear language of the Declaratory Order, and thus fails.

The Court notes that its conclusion that the CLSA need not be submitted to the PSC for approval is consistent with the conclusion of a another state commission that recently addressed the issue. The commission for the state of Washington recently concluded that an agreement markedly similar to the CLSA submitted to the PSC here is not subject to section 252.[46] Although this decision is not binding on the Court, it is instructive with respect to how another state regulatory body views line sharing agreements in relation to section 252.

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[45]Declaratory Order, ¶ 8, n.26 (emphasis in original).

[46]See Order No. 02: Dismissing Petition, In the Matter of the Petition of Multiband Communications, LLC, for Approval of Line Sharing Agreement with Qwest Corporation Pursuant to Section 252 of the Telecommunications Act of 1996, Docket No. UT-053005 (WUTC April 19, 2005)("Washington commission order")(attached to Qwest's Reply at attachment 1).

Finally, the Court believes that its conclusion herein is consistent with the intent of the FTA. Congress, in enacting the FTA, sought to promote competition by removing unnecessary impediments to commercial agreements entered between ILECs and CLECs, and also to recognize certain ongoing obligations for interconnection agreements. The result reached here is not at odds with either of Congress' purposes in enacting the FTA.[47]

V. CONCLUSION.

Based on the foregoing, the Court concludes that the CLSA is not a negotiated interconnection agreement that must be submitted to the PSC for approval under section 252. Accordingly,

IT IS ORDERED that Qwest's Motion for Judgment on Appeal[48] is GRANTED in part and DENIED in part as follows:

1. The CLSA[49] at issue herein is not subject to review and

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[47]The Court finds unpersuasive the PSC's argument that the physical linking of Qwest's and Covad's networks makes the CLSA an "interconnection agreement." The CLSA concerns only line sharing which, as already noted, is not a service or element that must be included in an interconnection agreement.

The Court also declines to afford the PSC's decision Chevron deference. The Ninth Circuit has ruled that a state commission's interpretations of the FTA are subject to de novo review. US West Communications v. MFS Intelenet, 193 F.3d at 1117. The Court declines the PSC's invitation to "revisit the standard of review that should be applied to a state commission's authority to require an interconnection agreement to be filed."

Finally, the Court finds moot the PSC's argument that it may add to the list of required UNEs. Even if this argument had a legal basis, there is no evidence before the Court that the PSC has formally decided to add line sharing to the list of UNEs. Thus, the issue is moot.

[48]Court's Doc. No. 31.

[49]Cmplt. ex. 2.

approval by the Defendants under section 252 of the FTA.

2. The PSC's Final Order and Order on Reconsideration[50] issued on September 22, 2004, is therefore VACATED.

3. All other requested relief is DENIED. The Court determines that Qwest's request for prospective injunctive relief is overly broad and goes beyond the narrow issue presented in this action.

The Clerk of Court shall enter Judgment accordingly.

DATED this 9th day of June, 2005.

Carolyn S. Ostby
United States Magistrate Judge

CERTIFICATE OF MAILING
DATE: 6/10/05 BY:
I hereby certify that a copy of this order was mailed to:
James Raine
Ted Smith
Monica Brand

[50] Cmplt. ex. 9.

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused the Response of BellSouth Telecommunications, Inc. to Cross-Motion for Summary Judgment or Declaratory Ruling in Docket No. 2004-316-C to be served upon the following this August 2, 2005.

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